No. 464

In the Supreme Court of the United States

OCTOBER TERM, 1942

MRS. ANNE MILLER, PETITIONER

vs.

C. JAMES ARROW, RESPONDENT

MOTION FOR CERTIORARI TO CORRECT DIMINUTION OF RECORD

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Now comes the petitioner in the above entitled action and makes her motion for an order in this Court directing the courts below, the Supreme Court of Ohio and the Court of Appeals of Mahoning County, Ohio, *inter alia*, to deliver to the Clerk of this Court the documents and original papers referred to in the Certificate of the clerk of the Supreme Court of Ohio, of which he says in the said Certificate that he has included all the items of the petitioner's praecipe "Except items 16, 17, 18 and 19:" that the said court below be directed to certify to this Court the said "items 16, 17, 18, and 19" of petitioner's praecipe.

Furthermore since said Seba Miller, Clerk of the Supreme Court of Ohio's statement that he has included all the entries and original papers "except items 16, 17, 18, and 19" is absolutely false, the petitioner calls for *additional* documents and original papers of her praecipe, illegally withheld, as follows:

Secondly: Petitioner's motion is that the Court of Appeals of Mahoning County and the Supreme Court of Ohio be directed to certify to this Court and to the record of the above entitled action the entry in the court's docket of October 24, 1941 referred to as No. 5 page 5 and in last paragraph of page 6 of

petitioner's petition, "Judgment reversed and cause remanded etc."

Third: That the said courts below be directed to certify for the record of this case the entries and report of Hearing on the Merits of Sept. 6, 1941.

Fourth: That the said courts below be directed to certify for the record of this case the entries and orders of the Hearing of the Motion spread on this record herein in the transcript already submitted by the Supreme Court of Ohio on page 16, a motion of diminution of record heard in the said Court of Appeals on or about Sept. 1st.

Fifth: That the Supreme Court of Ohio be directed to certify to the record of this case the omitted original document entitled "Letter by Appellants to the Chief Justice," referred to in the entry entitled "Journal 193A page 146, May Term, A.D. 1941, to wit May 22."

Sixth: That the said courts below be directed to certify to the record of this case the original documents all and the court's entries in the Common Pleas Court of Mahoning County invading the petitioner's right to take depositions in this case below.

Seventh: That the said courts below be directed to certify to the record of this case the journal entry approved and signed by both sides, embodying the judgment of the Court of Appeals of October 24th after Hearing on the merits of Sept. 6, 1941.

MEMORANDUM AND ARGUMENT

In the petitioner's application for supersedeas and extension of time for filing her petition in the above entitled action, petitioner, to secure the said extension, stated that the Supreme Court of Ohio had wholly failed and refused to exercise judicial discretion in the matter of her application for supersedeas and allowance of appeal. The items 16, 17, 18 and 19 are the original

documents which are necessary to show to this court the customary and continued denial to the petitioner of due process of law by the Supreme Court of Ohio. How flagrant was this denial and its appalling psychology is referred to on page 15 of the petitioner's brief. The said items 16, 17, 18 and 19 are the original documents to justify the legaiity of the order in this court by Mr. Justice Stanley Reed, of August 22, 1942, by reason of which this petition is before this Court.

This Court will no doubt wonder why the Clerk of the Supreme Court of Ohio has gone to such lengths in his attempt to suppress the said items 16, 17, 18, 19, which he admits in his Certificate that he has suppressed.

He has done so because in item 16, marked Exhibit A in the documents accompanying the petitioner's application for supersedeas, is pencilled the "Dear Seba" matter referred to on page 15 of Petitioner's brief, and worse. The petitioner has not quoted the worst of it in the said brief. When this original document is seen, it proves to be the a fortiori of Emerson's humorous saying "The devil is an ass." And this document shows how assinine public officials in high places bedevil the orderly processes of constitutional government, and prove as great a menace to constitutional liberty as vicious tyrants.

The courts below have suppressed the foregoing entry No. 2 in order to cover up the obvious fact, which will appear upon a complete record of this case, that the said entry of October 23, "Reversed and Remanded," was the only legal finding possible on the record of this case below.

The suppression below of the entry and report of hearing on the merits on Sept. 6, 1941, referred to in paragraph 3 above, is to make a complete misrepresentation of the whole procedure below.

The Hearing on or about Sept. 1, 1941 of motion of diminution of record below, (motion set out on page 16 of transcript,) is the vital record of the crux of this case; in which the respondent was forced by the court to admit, what he had denied in his brief therein, *the existence* and contents of the said Doctor's certificate of Dr. N. J. Nardacci: upon which admission

the trial judge, George H. Gessner produced the said doctor's certificate, found on page transcript.

The items No. 5 and 6 foregoing are vital papers of this case showing both the fact that these courts below had the temerity to deny due process, and did deny due process by peremptory orders; but they show also, particularly item 5, the reign of terror that these courts have been maintaining in Ohio, and in particular, how the same has been aided and abetted by criminal assault on litigants in courthouse corridors by the bailiff of Chief Justice Carl V. Weygandt.

The petitioner has complained of denial to her of due process in the Ohio courts. And immediately the Supreme Court of Ohio confirms the validity of petitioner's complaint by further and conclusive denial of due process in the deliberate withholding of original papers, documents and entries called for in petitioner's praecipe; and the false and bold statements of the clerk, that "by the order of the court," items 16, 17, 18 and 19 of petitioner's praecipe he has withheld. That is not all; while stating, with very Japanese duplicity, that the record is otherwise complete, he withholds *additional*, indeed crucial entries, papers and original documents. What could be more conclusive denial of due process than such deliberate sabotage of the Record in this case!

The only case the respondent ever had was predicated on the purloining of documents and tearing out pages of this Record. In the face of the complete Record he has no case; and obviously knows it! The petitioner's case is complete when the Record is complete. It stands unassailed on the Record.

The petitioner knows of no courts in the world where today the purloining of records constitutes due process of law—except possibly Germany. And she lifts her hands to the Highest that such may never become process of law in these United States!

PROPOSED ORAL ARGUMENT ON THE CRUCIAL QUESTION IN THIS CASE

In the hypothetical case of my argument, Your Honors,—we suppose that the defendant is on his way to the court to the trial of his case before the jury. And suppose that, on his way to the court, the defendant is struck down in the street by an automobile; and is carried to the hospital. And assume then, upon the calling of the case before the jury, etc., the trial judge proceeds to instruct the jury substantially as the trial judge instructed the jury in this case, (page 4, petition, page , Record). And suppose, at the conclusion of the said instructions by the court, the jury returns, as in the case at bar, the directed verdict for the full claim of the plaintiff, against the defendant who is lying stricken in the hospital.

Then assume, that, on the same evening, the defendant dies at the hospital. Does anyone suppose that a verdict and judgment so returned, can stand, to prejudice the interest of the heirs of the defendant's estate?

It is the contention of the petitioner that the mere absence of the defendant, in these circumstances, creates a situation that must be dealt with in conformity to due process. A motion to set aside such a verdict is fatal to it.

Now the trial judge refused even a hearing of petitioner's motion to set aside the verdict in this case, notwithstanding sworn averments of fact were incorporated in it, and the rules of practice in Ohio and in said court, require hearing to be held on such motions.

We do not deny that the trial judge has a proper judicial discretion, if it be exercised in conformity to law and in conformity to the Constitutional guarantees of the litigants. But in our hypothetical case of this argument, how can it conceivably be said that the court has exercised a judicial discretion, when the only fact confronting him is the absence of the defendant. And a fortiori, how is it judicial discretion to purloin the Doctor's Certificate and refuse petitioner hearing on her motion?

It will appear at once that this class of cases may be divided roughly into two divisions: (1) where there is a mere absence of the defendant, and the court knows nothing of its cause; (2) where there is the absence of the defendant, and, upon short notice, in deference to the majesty of the law, the defendant presents to the trial judge the certificate of the family physician or other competent medical authority, a certificate that the defendant is too ill to attend court, or to transact business.

It is our contention, Your Honors, that since the same law which created the court, has created the qualifications and the status of the practising physician, the law must respect the creatures of the law. And it is the contention of the petitioner that the presentation of the physician's certificate to her state of health, is to create before that trial court a prima facia status of the petitioner. And that being the only competent basis that the court has to rely on, he must grant continuance.

If, however, he wishes to have additional evidence and data upon which to exercise a determinative judicial discretion, it is of course obvious that he may have the reports of other physicians of his own selection. And if, having appointed physicians to diagnose the patient's condition, and having heard their testimony in open court, where they may be subjected to cross-examination, if the trial court shall then exercise a judicial discretion, all would be ready to admit that this is due process of law.

But if the trial court shall exercise nothing but whim or prejudice, or enter any order without evidence or process of law, "If any question of fact or liability be conclusively presumed against him," and especially if the court enter any such order in the face of the certificate of a regularly practising physician admitted as such under the laws of the State, and if under those circumstances he orders a verdict against the defendant, then such an order must be said to be, in the language of this court in the case of Bank vs. Oakley, 4 Whit.

235: "special, partial and arbitrary", and therefore, as the court declared in that case, a violation of the Fourteenth Amendment. And it would be, in the language of the same court, "subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." Said the court in Brown vs. Hammell, 6 Pa. 86, 47 Amer. Dec. 431; Zeigler vs. South, etc. Ry. Co. 58, Ala. 594, 599, quoting 40 Neb. 64, 75; 58 N.W. 543. "If any question of fact or liability be conclusively presumed against him, this is not due process of law."

That these principles are already recognized in the federal courts, is the fact. In the federal district court at Cleveland in a case concurrent with this case, upon the presentation, by a defendant under indictment in the district court, of his physician's certificate that he was unable to attend court on the date that his case was called, the federal court did not proceed with the hearing on that day but it did appoint two physicians practising in that jurisdiction to attend the defendant under the orders of the court, to diagnose his case; and the court heard their testimony; and these physicians were subjected to the cross-examination of the defendant's counsel. And the court having heard evidence from both sides under the rules of law, made a determination to proceed with the trial of the cause. And this and only this can constitute due process, in such circumstances, under our Constitutional guarantees.

The notorious author of the notorious "Mein Kampf," plagiarizing to debase the satiric denunciation of Plato, stated years enough before the world catastrophe that mankind could have been warned,—that the gigantic liar is the only good liar and the gigantic fraud the only good fraud. This philosphy has been the actuating philosophy of the whole record of this case below. But nowhere is the criminal boldness of this record more incredible, therefore good in the "Mein Kampf" sense, than the orders that were actually entered in

the common pleas court of Mahoning County to prevent this petitioner's taking depositions and securing her evidence as provided by the laws of Ohio. Now this boldness has its crowning aspect in the attempt to suppress these incredible orders from the Record of this case. The petitioner respectfully calls to the attention of this highest court this crowning betrayal of due process; and prays this court to compel the certification of the petitioner's Sixth item, the record of these incredible orders.

Respectfully submitted,

MRS. LOCKE MILLER
Petitioner